Nos. 11,648 and 11,649

IN THE

United States Court of Appeals

For the Ninth Circuit

E. L. EASON, JR.,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

and

E. L. EASON, JR., FLORA RUTH EASON and LEWIS C. EASON, as Trustee of the Estate of Mildred Eason Stouffer, co-partners doing business as Eason Grinding Company,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

These are appeals from two judgments rendered in favor of the United States of America (plaintiffs below) in actions brought, under the Federal Renegotiation Act, to recover amounts alleged to have been excessive profits realized by appellants in the years 1942 and 1943.

While separate appeals were taken from each judgment, the matters have been consolidated for hearing by stipulation and order of this Court. (R. 44.)

JURISDICTIONAL STATEMENTS.

(1) Statutes conferring jurisdiction on the United States District Court.

The Statutes believed to sustain jurisdiction of the United States District Court are as follows:

> "The District Courts shall have original jurisdiction * * * Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * *."
>
> 28 *U.S.C.A.*, Sec. 41, Subdiv. 1; Sec. 24 *Judicial Code.*

> "Actions on behalf of the United States may be brought in the appropriate Courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."
>
> *Renegotiation Act,* Sec. 403 (c) (2).

(2) Pleadings showing the existence of the District Court's jurisdiction.

(a) The complaints of the United States, (R. 2, 22.)

(b) The answers of appellants. (R. 7, 30.)

(3) The statute conferring appellate jurisdiction on the United States Court of Appeals.

28 *U.S.C.A.*, Sec. 225; *Judicial Code,* Sec. 128, provides:

> "The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions * * * First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

(4) The statute involved.

The Renegotiation Acts of 1942 and 1943. Sec. 403(c) Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245, as amended by (1) Sec. 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982, (2) Act of July 14, 1943, Public Law 149, 78th Congress, 57 Stat. 564, (3) Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 564, and (4) Revenue Act of 1943 (Effective Feb. 25, 1944), Public Law 235, 78th Congress, 58 Stat. 21, 78.

STATEMENT OF THE CASE.

The United States, in the Court below, filed two complaints seeking to recover from appellants amounts of money claimed to be due as the result of orders determining excessive profits made by the Under Secretary of War under authority conferred by the Renegotiation Act.

In the first action (numbered on this appeal 11648) the complaint in substance alleged that on Aug. 11, 1944 the Under Secretary of War made his order to the effect that appellant in 1942 made excessive profits in the amount of $33,920 and was entitled to a tax credit of $6,073.43. The prayer was for the difference between said amounts, to-wit: $27,946.57. (R. 2.) At the hearing before the lower Court the United States stipulated that the tax credit appellant was in fact entitled to, was the sum $12,221.86 and that the principal amount due the United States under said order was the balance of $21,698.14.

In the second action (numbered on this appeal 11649) the complaint in substance alleged that on Dec. 11, 1944, the Under Secretary of War made his order to the effect that appellants in 1943 made excessive profits in the amount of $69,232.06 and were entitled to a tax credit of $33,584.79. The prayer was for the difference between said amounts, to-wit: $35,647.27. (R. 22.)

Appellants filed lengthy answers to each of these complaints (R. 7, 30) advancing many grounds as to the unconstitutionality of the Renegotiation Act, and other matters of defense.

The trial judge gave judgment for the United States in each suit and appellants appealed to this Court. (R. 19, 42.)

In the first action, Findings of Fact Nos. 3 and 5 are as follows:

"3. That the tax credit to which defendant is entitled, under Section 3806 of the Internal Revenue Code is in the amount of Twelve Thousand Two Hundred Twenty One and 86/100 Dollars." (R. 16.)

"5. Defendant has not paid to the United States and the United States has not withheld or by any other method eliminated said excessive profits in the amount of Thirty Three Thousand Nine Hundred Twenty Dollars ($33,920), less the tax credit aforesaid, nor any part thereof; that the amount now due, owing, and unpaid to the United States from defendant is $25,133.67 **which amount includes interest at the rate of 6% per annum, from August 11, 1944 to date.**" (R. 16.)

In the second action, Finding of Fact Nos. 3 and 6 are as follows:

"3. That the tax credit to which defendants are entitled, under Section 3806, of the Internal Revenue Code, is in the amount of Thirty Three Thousand Five Hundred Eighty Four and 70/100 Dollars ($33,584.79)." (R. 39.)

"6. That defendants have not, nor has either of them, paid to the United States said excessive profits in the amount of Sixty Nine Thousand Two Hundred Thirty Two and 06/100 Dollars ($69,232.06), less the tax credit aforesaid nor any part thereof; and that the amount now due, owing and unpaid the United States from the defendants is $40,103.18, **which amount includes interest at the rate of 6% from February 25, 1945 to date.**" (R. 40.)

Judgments for the United States were rendered accordingly. (R. 18, 41.)

While these appeals were pending, there was pending in the Supreme Court of the United States three cases involving the constitutionality of the Renegotiation Act *(Lichter v. United States; Pownall v. United States,* and *Alexander Wool Combing Co. v. United States),* and it was stipulated and ordered herein that the present cases be held in abeyance until decisions were rendered by the Supreme Court in the foregoing cases.

On June 14, 1948, the Supreme Court rendered its decision in the three foregoing cases (92 L. ed. Ad. Opinions 1260) upholding the constitutionality of the Renegotiation Act. Following which decision appellants herein abandoned all points on which said appeals were originally based, save and except the one point relative to the inclusion of interest in said judgments. (R. 46.)

Judgment in the first action includes interest in the sum of $3,435.53, which sum is now bearing interest at 6% per annum from the date of said judgment.

Judgment in the second action includes interest in the sum of $4,455.91, which sum is now bearing interest at 6% per annum.

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Court erred in including in the judgment rendered in appeal action 11648, interest on the sum of $21,698.14 from August 11, 1944 to the date of entry of said judgment, or including therein any interest at all.

2. That the District Court erred in including in the judgment rendered in appeal action 11689, interest on the sum $35,647.27 from February 25, 1945 to the date of entry of said judgment, or including therein any interest at all.

SUMMARY OF ARGUMENT AND STATEMENT OF GROUNDS ON WHICH IT IS CLAIMED NO INTEREST COULD BE ALLOWED.

Appellants allege and maintain that the lower Court erred in including interest in each of said judgments for the following reasons:

1. The wording and provisions of the Renegotiation Act, as construed by the Supreme Court, make manifest that it was not the intention of Congress to make any order determining excessive profits one that carried interest thereon.

2. An order determining excessive profits is neither the kind nor character of obligation due the United States that bears interest prior to judgment.

3. The allowance of interest prior to judgment, on an order determining excessive profits, is inequitable.

ARGUMENT.

1. THE WORDING OF THE RENEGOTIATION ACT MAKES MANIFEST THAT IT WAS NOT THE INTENTION OF CONGRESS TO MAKE ANY ORDER DETERMINING EXCESSIVE PROFITS ONE CARRYING INTEREST.

A reading and consideration of the provisions of the Renegotiation Act clearly demonstrates that it was not the intention of Congress to make any order of an executive or administrative agency determining excessive profits one carrying interest thereon. Not only does the Act negative any conclusion that interest should be allowed, but the very purpose sought to be attained and the exigencies of the situation prevailing when the contracts renegotiated were entered into, as explained by the Supreme Court in the cases of *Lichter, et al., v. United States,* supra, also negatives such conclusion.[1]

The Renegotiation Act does not provide that interest shall be collected on any sums found to be excessive profits. True, the failure of the Act to provide for such interest is not conclusive on the question of whether interest should be allowed *(Jackson County v. United States,* 308 U.S. 348, 351; 84 L. ed. 313, 317); but the failure of Congress to provide for interest is a strong circumstance to be considered in determining the question. *(Jackson County v. United States,* supra; *Billings v. United States,* 232 U.S. 261; 58 L. ed. 596.)

The particular Renegotiation Act involved herein is the Revenue Act of 1942 (commonly referred to as

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[1]Pertinent extracts from the opinion of the Supreme Court will hereafter be set forth.

the Renegotiation Act of 1942) which amended Sec. 403 of the Sixth Supplemental National Defense Appropriation Act and became effective on October 21, 1942.[2]

Pertinent provisions of the Renegotiation Act of 1942 are as follows:

"Sec. 403. (a) * * *

(3) The terms "renegotiate" and "renegotiation" include **the refixing by the Secretary of the Department of the contract price.**

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found **as a result of renegotiation** to represent excessive profits.

* * * * * * *

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for **the renegotiation of the contract price** at a period or periods when, in the judgment of the Secretary, **the profits can be determined with reasonable certainty;**

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, **of any excessive profits** not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

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[2]There are certain retroactive provisions of the Renegotiation Act of 1943, effective on February 25, 1944, which we will hereafter set forth.

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the

subcontractor and actually unpaid at the time the contractor receives such direction. * * *

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor **to renegotiate the contract price.** * * *

(2) Upon renegotiation, the Secretary is authorized and directed **to eliminate any excessive profits** under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) **by withholding,** from amounts otherwise due to the contractor or subcontractor, **any amount of such excessive profits;** or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, **any amount of such excessive profits** under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of **any amount of such excessive profits actually paid to him;** or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States **to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him** and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits there-

on. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) * * *

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall

prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) **the aggregate sales by the contractor or subcontractor,** and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts

thereunder do not exceed, or **in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.**

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs."

According to the Act, "excessive profits" is that amount reached as the result of "renegotiation", which in turn is the "refixing of the contract price." The Act provides for the insertion in contracts of provisions for the repayment by the contractor to the United States of any "excessive profits" not otherwise eliminated; for the "renegotiation of the contract price" at a period of time when "the profits can be determined with reasonable certainty" and for the "repayment" to the United States of the amount of "any reduction in the contract price."

The Act further provides that upon renegotiation, a Secretary is authorized to "eliminate any excessive profits" in several distinct manners:

1. By reduction of the contract price if the same has not been paid;

2. By withholding from amounts otherwise due the contractor "any amount of such excessive profits";

3. By directing a contractor to withhold for the account of the United States, from amounts

otherwise due the subcontractor, "any amount of such excessive profits" under the subcontract;

4. By recovery from the contractor by repayment, credit or suit "any amount of such excessive profits actually paid". In conferring authority of the Secretary to sue, the authority is limited to "recovery from such contractor or subcontractor, any amount of such excessive profits actually paid to him."

It should be noted that the Act provides that all money recovered by way of repayment or suit is to be covered into the Treasury as miscellaneous receipts and not credited back to any expenditures made by the Department.

Throughout the Act, the purpose is **limited to the elimination of excessive profits and to the payment to the United States of the amount of such excessive profits and no more.**

In the Renegotiation Act of 1943, drastic changes were made in the procedure, but **the Act is again limited solely to excessive profits.** The Act sets up a War Contracts Price Adjustment Board for the purpose of determining the excessive profits in the place of the Secretary in whom was vested such power by the prior Acts.

Sec. 403(a) (D) provides for the recomputation of a renegotiation order and that by such recomputation there shall **be repaid by the United States (without interest) to the contractor, the amount of the net renegotiation rebate** computed as in said section provided.

Sec. 403(b) provides for the insertion of certain provisions in contracts and subcontracts, all relating to the elimination and reduction in the contract price, or repayment to the United States, of any **excessive profits received.**

Sec. 403(c) (1) provides that any order of the Board determining excessive profits shall be final and conclusive and not subject to review by any Court in the absence of filing a petition with the Tax Court of the United States.

Sec. 403(c) (2) provides for the same methods of eliminating excessive profits as is contained in the Act of 1942.

Sec. 403(e) (1) provides that "the filing of a petition under this section (with the Tax Court) shall not operate to stay the execution of an order of the Board."

Sec. 403(e) (2) provides that under orders of renegotiation made under the Act of 1942, an aggrieved contractor may file a petition with the Tax Court of the United States for a redetermination thereof.

Sec. 403(e) (2) (B) provides that renegotiation can take place on all contracts entered into as late as six months following June 30, 1945 or until such time as the President or the Congress may proclaim the termination of hostilities.

The Supreme Court of the United States, in the cases of *Lichter, et al., v. United States,* ..... U.S. ....., 92 L. ed. Ad. Op. 1260, has analyzed the Act and at great length set forth the exigencies of war leading

to its adoption, the purposes sought to be attained thereby, the reasons and necessities for its adoption and the rights of contractors and the Government thereunder. Before proceeding to further argument we set forth some of the pertinent language of the Court's opinion.[3]

In Footnote 6 to the opinion (p. 1271) a portion of Senator Harry S. Truman's Committee Report as to the reasons for adopting Renegotiation, in place of some other form of letting contracts, is set forth as follows:

> "To obtain speed we have had to use contracting methods **that would never have been tolerated in peacetime.** We granted cost-plus-fixed-fee contracts where specifications were not known or had to be subject to numerous changes or where **there was no time to prepare detailed specifications.** We also granted lump-sum contracts for many items which had never before been made in quantity and **for which estimates of cost were mere guesses.** This was especially true of the billions of dollars of war contracts which were hastily 'shoveled' out early in January 1942."

In the same Footnote and still quoting from the same Report it is stated (p. 1272):

> "Accordingly, **advance prices quoted in good faith** by manufacturers in a large number of cases **have little relation to costs actually experienced in the course of production.**"

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[3]Page references to the *Lichter Case* are to the report in 92 L. ed. Advance Opinions. All emphasis appearing in any quotations in the Brief have been supplied by the writers.

On page 1275 of the opinion, the Court points the reasons why Renegotiation was for the benefit of both parties as follows:

> "The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery **that accurate advance estimates of cost were out of the question.** * * * Congress sought to do everything possible **to retain and encourage individual initiative** in the world-wide race for the largest and quickest production of the best equipment and supplies. **It clung to its faith in private enterprise.** The problem was to find **a fair means of compensation for the services rendered and the goods purchased.** * * * However, experience with these alternatives convinced the Government that contracts at fixed initial prices still provided the best incentive to production."

In dealing with the advisability of Renegotiation over all other types of contracts the Court states at p. 1277:

> "The plan proved itself readily adaptable to the needs of the time. **It called for initial contract estimates** based upon the best available information at the time of entering into the contracts. Production proceeded at once on the basis of those estimates. **Many factors were incapable of exact determination.** The final net compensation, however, resulted from **a renegotiation made after both parties had had the benefit of actual experience under the contract.**"

On page 1279 the Court, in other language, sums up the matter as follows:

> "There was no express definition of the term 'excessive profits' in the Original Renegotiation Act. However, in its § 403 (b), there was a relevant statement in connection with the renegotiation clauses required to be inserted in future contracts for an amount in excess of $100,000 each. The Secretary was required to insert in such contracts, thereafter made by his Department, 'a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; * * *.' Contractors were also to be required to insert a like provision in their subcontracts. **This statement indicated a relationship between current 'excessive profits' and those which later might be determined with 'reasonable certainty.'** "

Many other portions of the Opinion might be quoted to the same effect.

To the foregoing must be added the undisputed fact that the Renegotiation Act neither prohibits nor makes unlawful the making of contracts for war material between individuals or an individual and the Government; it does not prohibit or make unlawful the charging of any initial price the parties may agree upon in such contracts; it does not prohibit or make unlawful the receiving of any profit whether large or small under such contract; it does not declare that any such contracts shall be unlawful or unenforceable between the parties (Cf. *Panama Refining Co. v. Ryan,* 293, U.S. 388, 79 L. ed. 446.)

In fact, as stated in the *Lichter case,* the prompt entering into and execution of such contracts was the end sought to be attained by the Act. Private enterprise was to be encouraged and the necessities of war brooked no quibbling over initial price or delay attendant upon such quibbling. The parties were to enter upon and execute their contracts based upon a tentative estimate agreeable to both parties and to be made certain at some later date when conditions were such that the tentative estimate could be reformed into a certain and proper one.

Furthermore, the opinion of the Supreme Court demonstrates that the Act was not a remedy for fraud. The fraud statutes of the United States were adequate to cover any such situation. The Act did not seek to impose any penalty upon any manufacturer or supplier of goods and services to the Government because an initial estimate was subsequently found to be excessive. The Act was a mere procedure whereby that which originally was indefinite and uncertain could subsequently be made definite and certain. If, in the light of subsequent events and knowledge, the original estimate was too high then, as stated in the Act, there was to be a "refixing by the Secretary of the department of the contract price." The Supreme Court's opinion points out that there were many other ways tried and discarded by the Government for the letting of contracts and that renegotiation was the only one that was fair to both parties. The Truman Report was not dealing with fraudulent estimates but with "advance prices quoted in good faith", and there has

never been any contention in the instant cases but what the compensation received by appellants herein was based upon initial prices quoted in good faith. Such profits were reported as income and the requisite income tax paid thereon.

Summed up, **the Renegotiation Act was not enacted for the purpose of imposing any penalty of any kind on any person directly or indirectly contracting with the Government.** The Act, in express terms and as construed by the Supreme Court, had no other object than to reimburse the Government for any profits received by a private citizen which, on an analysis made months after the original contract was entered into, was found to be out of proportion to services rendered or goods manufactured or supplied.

To add to the amount of such sum that has been determined to be excessive profits interest thereon, **is in effect to add a penalty to those private firms and individuals who exerted their best efforts to speedily supply the Government with the munitions of war.**

There are other reasons, disclosed on the face of the Act, why interest cannot be allowed on orders determining excessive profits. We here state a few of such reasons.

In the Renegotiation Act of 1943 there is a provision for the recomputation of a prior renegotiation order (Sec. 403 (a) (D) wherein it is provided that if on such recomputation a rebate is to be given to the individual, the United States shall pay such rebate without interest.

In the case of *Jackson County v. United States,* 308 U.S. 350, 84 L. ed. 313, the United States brought suit against the County Commissioners of Jackson County, Kansas, to recover taxes paid by the United States on behalf of an Indian, together with interest on such taxes. In a treaty with the Indians it was provided that lands held in trust by the United States for such Indians should be exempt from taxation. Jackson County levied and collected taxes upon this land. The original judgment was in favor of the United States for the recovery of such taxes together with interest thereon. The Supreme Court held that the United States could not recover such interest. On p. 352 of the United States Reports, the Supreme Court states:

> "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States v. Sanborn,* 135 U.S. 271, 281, 34 L. ed. 112, 115, 10 S. Ct. 812; *Billings v. United States,* 232 U.S. 261, 58 L. ed. 596, 34 S. Ct. 421."

In the concurring opinion of Mr. Justice Black (p. 354) he states:

> "That Congress contented itself with the creation of the right to be free from taxation—as distinguished from a right to interest in a suit for refund—is emphasized by the conclusion which would be inescapable were this a suit against the United States for violation of the exemption here conceded to be binding on it. Without more, Congress would then—even on the basis of this con-

> cession—be deemed to have refused to create the separate right to recover interest."

As the Government would not be chargeable with interest in a suit brought by an individual to recover such renegotiation rebate, the Government cannot recover interest in a suit to recover excessive profits.

The various methods provided in the Act for the elimination of any excessive profits likewise leads to the conclusion that interest cannot be collected on the order determining excess profits from the date of said order to the time of judgment, where suit for collection is instituted by the United States.

According to the Act, the Government had the right to eliminate such profits (1) by withholding from amounts otherwise due the contractor, any amount of such excessive profits; (2) by in effect levying an attachment or execution on a debtor by directing a prime contractor to withhold for the account of the United States out of sums due to the person charged with excessive profits "any amount of such excessive profits." The Act does not direct that the Government can withhold from amounts otherwise due to the contractor "any amount of such excessive profits" plus interest thereon from the date of the order adjudicating excessive profits. Neither does the Act provide that the Government may order a debtor of the person charged with excessive profits to withhold for the account of the United States "any amount of such excessive profits" plus interest thereon from the time of the making of the order. Neither does the Act pro-

vide that in any suit brought by the Government to collect excessive profits that interest may be charged from the date of the making of the order; the Act provides that the Government may only recover "any amount of such excessive profits actually paid to him."

As the Act is explicit in limiting the right of the Government, in eliminating excessive profits, to the collection by suit or withholding or collection from a debtor of the amount of the excessive profit, the Congressional intention is clearly expressed that nothing else shall be recovered.

If resort to any of the measures provided for in the Act, other than suit for the elimination of such excessive profits, does not carry with it the right to interest, then where suit is brought, to allow interest on the order from the time of its making to the date of judgment would be in effect to allow interest upon interest; because once the amount of interest is reduced to judgment, it in turn bears interest until the judgment is paid. Interest upon interest cannot be allowed unless the contract expressly provides therefor or the same is authorized by a statute to that effect. *(Cherokee Nation v. United States,* 270 U.S. 476, 490, 70 L. ed. 694, 700.)

An added reason why interest was not contemplated by the Act is found in the provision that even excessive profits cannot be recovered from anyone whose contracts, in the aggregate, for any fiscal year, did not exceed $100,000. In such event the contractor may have had a net profit of 99% and yet no portion

thereof could be recovered by the Government; while a contractor who had done a million dollars worth of business may have made only 5% net profit and still such sum could be found by a Secretary to be excessive in part. To allow the Government to recover not only the amount determined to be excessive profits in the latter case but also to collect interest thereon could very easily result in depriving the contractor of any profit at all. Such was not the purpose or intent of the law.

Lastly, and for a reason to be argued more fully under the next succeeding heading, the recovery of excessive profits does not fall into that category of obligations which must forthwith be paid to the Government in order that the Government may carry on its fiscal affairs. By the very terms of the Act, renegotiation does not require payment to the Government of any excessive profits during the period that warfare is actually being conducted; the Act permits of such renegotiation for a period long after the cessation of actual warfare and during the time "that competitive conditions have not been restored." (Act of 1943, Sec. 403(c) (2) (B)).

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2. AN ORDER DETERMINING EXCESSIVE PROFITS IS NEITHER THE KIND NOR CHARACTER OF INDEBTEDNESS DUE THE UNITED STATES THAT BEARS INTEREST.

The law in the Federal Courts, as to the allowance of interest on indebtedness owing the United States, differs from the law of the States in that the Federal

Courts do not follow the rule that interest can only be allowed when provided for by statute. In place of the rule that interest is a creature of statute the Federal Courts have adopted an equitable doctrine as follows:

> "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but **is given in response to considerations of fairness. It is denied when its exaction would be inequitable.**"
>
> *Jackson County v. United States,* 308 U.S. 350; 353; 84 L. ed. 313.

The foregoing rule has been applied by the Supreme Court in the recent case of *Rodgers v. United States,* (decided October 17, 1947) 92 L. ed. Ad. Opinions, 64, by holding that a test of whether interest should be allowed to the United States prior to judgment is whether the money due was necessary to the United States on a particular date to meet its estimated expenditures. The Court states, on page 66:

> "The contention is hardly supportable that the Federal Government suffers money damages or loss, in the common law sense, to be compensated for by interest, when one convicted of a crime fails promptly to pay a money fine assessed against him * * *; unlike a tax, **it does not rest on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures.**"

As pointed out under the preceding heading, there is nothing in the Renegotiation Act leading to the conclusion that it was necessary for the Government

to immediately collect any amount determined by such administrative order in order to meet its anticipated expenditures, or that such amount was a carefully or otherwise estimated amount necessary for such future expenditures. On the contrary, the wording and procedure of the Act negative such conclusion.

The Act sets up the following procedure and states the times in which each step is to be taken:

(1) Renegotiation is not to start until a Secretary is of the opinion that some contractor has realized excessive profits; (Sec. 403 (c) (1));

(2) The Secretary is then to notify the contractor to "renegotiate the contract price". (id.);

(3) Within **one year** after the filing of certain financial statements by the contractor, or within such shorter period as may be prescribed, "the Secretary of a Department may give the contractor or subcontractor written notice * * * that the Secretary is of the opinion that the profits realized from some or all of such contracts may be excessive, and **fixing a date and place** for an initial conference to be held within **sixty days thereafter.**" (Sec. 403 (c) (5));

(4) No renegotiation of the contract price * * * shall be commenced by the Secretary **more than one year after** the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or sub-contract, as determined by the Secretary, occurs. (id.)

The foregoing is certainly not consistent with the claim that any amount determined to be excessive

profits constitutes a "basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures."

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3. THE ALLOWANCE OF INTEREST PRIOR TO JUDGMENT WOULD BE INEQUITABLE.

It is held in *Jackson County v. United States,* supra, that interest is "given in response to considerations of fairness" and "It is denied when its execution would be inequitable". Applying this rule to the cases at bar results in the conclusion that the allowance of interest prior to judgment is unfair and inequitable.

Until the Supreme Court spoke in the *Lichter* case, many legal minds throughout the Nation were of the opinion that the Renegotiation Acts were unconstitutional and numerous actions were filed in the various Courts seeking injunctions, declaratory relief and other remedies based on such opinions and contentions. Several of these cases found their way to the Supreme Court and that Court disposed of the cases without passing on the constitutionality of the Acts. *(Aircraft & Diesel Equip. Corp. v. Hirsch,* 331 U.S. 752; *Macauley v. Waterman S.S. Co.,* 327 U.S. 540; *Mine Safety Co. v. Forrestal,* 326 U.S. 371).

In the instant cases the appellants resisted the complaints on numerous specifications as to the Acts being unconstitutional.

That the claims going to the constitutionality of the Acts were advanced in good faith and merited supreme

judicial interpretation and decision is evidenced (1) by the fact that the Supreme Court granted *certiorari* in three such cases, and (2) by the very lengthy opinion filed by the Supreme Court when it determined the Acts to be constitutional.

There has never been any claim—as indeed there could not be—that appellants' refusal to abide by the orders of the Under Secretary of War was prompted by any evil motives or by any desire to defraud the Government, or by any motive other than a firm belief that the orders violated the Constitution.

In addition there is the fact, well known to the Government and its representatives, that the enforcement of Renegotiation determinations is resulting in the virtual bankruptcy of those called upon to pay. The so-called excessive profits have been lawfully expended, in many instances by using them for the expansion of plants and the installing of new machinery to meet the demands of the Government for speedier and greater production. Now, such machinery and expansion is worth no more than junk on the market.

To allow interest on the determinations of the Secretary prior to judgment, results in cutting down the profits that under the law appellants were entitled to receive and, in many instances, in wiping out of such profits in full.

To allow such interest would be inequitable and unjust.

In *Sheppard v. Taylor,* 5 Peters 675, 8 L. ed. 269, sailors, who embarked on a lawful voyage but which was turned into an unlawful one for which they were imprisoned, sued to recover their wages. In upholding their right thereto, the Court held they were **not** entitled to interest for the following reason:

> "In respect to the claim of interest made by the libelants, we are of opinion that under the peculiar circumstances of this case, none ought to be allowed upon the wages, except for the period of time which has elapsed since the petition was filed against the assignees and owners on the 1st of December, 1825. **The previous delay was * * * under circumstances of so much doubt as to the nature and extent of the claim, as ought to preclude any claim for interest.**" (8 L. ed. at 283)

Compare *Silsby v. Foote,* 61 U.S. 378, 15 L. ed. 953 and *Crosby Valve Co. v. Consolidated Valve Co.,* 141 U.S. 441, 35 L. ed. 809, where suits were instituted for the infringement of a patent. The Court in each case held that there was an infringement and plaintiffs were entitled to damages to the extent that profits had been realized by defendants in the use of the patents; but that **interest could only be allowed from the time it was judicially determined** that such infringement occurred.

So here, until the Court determined that the Act was valid and the excessive profits were collectible by the Government, no interest should be allowed.

CONCLUSION.

For each and all of the foregoing reasons the judgment should be modified by striking therefrom all allowance of interest prior to judgment.

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